

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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LUKASZ GOTTWALD p/k/a DR. LUKE; KASZ	:	
MONEY, INC.; and PRESCRIPTION SONGS,	:	
LLC,	:	Index No. 653118/2014
	:	
Plaintiffs,	:	Hon. Jennifer Schechter
	:	
-against-	:	Part 54
	:	
KESHA ROSE SEBERT p/k/a KESHA; PEBE	:	Mot. Seq. No. __
SEBERT; VECTOR MANAGEMENT, LLC; and	:	
JACK ROVNER,	:	
	:	
Defendants.	:	

-----	:
KESHA ROSE SEBERT p/k/a KESHA,	:
	:
Counterclaim-Plaintiff,	:
	:
-against-	:
	:
LUKASZ GOTTWALD p/k/a DR. LUKE; KASZ	:
MONEY, INC.; PRESCRIPTION SONGS, LLC;	:
and DOES 1-25, inclusive,	:
	:
Counterclaim-Defendants.	:
-----	X

DEFENDANT KESHA ROSE SEBERT’S MEMORANDUM OF LAW IN SUPPORT OF
HER MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT¹

In October 2005, shortly after signing a teenage Kesha to his newly formed record label, Dr. Luke—then 32 years old—revealed himself as a monster. Out of her element at a glitzy Hollywood birthday party, Kesha quickly became incapacitated by the combination of two flutes of champagne and a so-called “sober” pill dispensed by Dr. Luke. Sensing an opportunity, Dr. Luke brought Kesha to his nearby hotel room, where he sexually assaulted her while she was too incapacitated to consent or resist. As sworn third-party testimony and phone records corroborate, Kesha immediately reported the assault to multiple people. And in subsequent years, but *before any litigation*, Kesha reported the assault to several medical providers.

In the years after the rape, Dr. Luke perpetuated the abusive dynamic, tormenting Kesha with unrelenting criticism of her weight, talent, and music. Dr. Luke refused to let Kesha produce music with anyone else, even when she offered him a continued financial interest in her work. Left with no options other than to write and record music with Dr. Luke, or seek judicial intervention to protect her right to create art free from his abuse, Kesha filed a public lawsuit in October 2014 laying bare the decade-long horrors she suffered working with Dr. Luke.

Since summoning that courage, everything Kesha feared about publicly standing up to Dr. Luke has come to pass. Dr. Luke immediately sued Kesha for defamation—Dr. Luke admits that he slept in a small hotel room with a teenage artist in his portfolio, but claims nothing improper happened—and Dr. Luke has since exploited this suit for more than four years to humiliate and bankrupt her. At her deposition, Kesha was subjected to highly inappropriate and irrelevant “victim-shaming” questions, including extensive cross examination regarding her consensual adult sexual relationships that have no bearing on a rape that occurred years earlier.

¹ This brief refers to (i) Plaintiff Lukasz Gottwald as “Dr. Luke”; (ii) Plaintiffs together as “Dr. Luke”; (iii) Defendant Kesha Rose Sebert as “Kesha”; and (iv) the accompanying affirmation of Leah Godesky, Esq. as the “Godesky Aff.” All emphasis is added and all citations are omitted.

Dr. Luke's lawyers even sneeringly pressed whether, at age 3, Kesha reported abuse to law enforcement. Third parties were asked if Kesha is "sexually aggressive," even though Dr. Luke claims they never had sex. Dr. Luke and his team of public-relations gurus drag Kesha's name through the mud at every opportunity, publicly declaring her a "liar" and "extortionist." And in 2016, after the Court directed Dr. Luke and Sony to permit Kesha to record *Rainbow* without Dr. Luke's involvement, Dr. Luke sued her for doing precisely that. This ever-expanding lawsuit has taught victims that they risk millions of dollars in legal fees simply for exercising the constitutionally protected and privileged act of filing a lawsuit supported by contemporaneous reporting, sworn testimony of multiple witnesses, and hotel and medical records.

With regard to any claims that are tried to a jury, Kesha is entitled to judgment as a matter of law that Dr. Luke is a public figure who must prove actual malice to prevail. As the Court of Appeals observed in its seminal public-figure analysis, the category of public figures is "quite broad." *James v. Gannett Co.*, 40 N.Y.2d 415, 422 (1976). Above all else, "[t]he essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention." *Id.* Considered under any metric, Dr. Luke is a public figure. He spent the last decade orchestrating media coverage of all aspects of his life, exploiting his fame to generate influence and wealth, and using a deep bench of public-relations experts to tout his celebrity status. A personality who—*before any lawsuit*—marketed himself as the most successful hitmaker since the Beatles, was awarded a star on the Hollywood Walk of Fame, was selected as an *American Idol* judge, hired multiple public-relations experts, and was featured in a lengthy puff piece in *The New Yorker*, is in no sense a private figure.

This Court should substantially narrow the case before trial, moreover, because the undisputed facts show that nearly all the statements on which Dr. Luke's Count I defamation claim is based are not actionable, because they (i) are privileged under New York law; (ii) are

non-actionable opinion statements; (iii) were neither directed nor authorized by Kesha; and (iv) are untimely. And in a stunning, late-breaking admission, Dr. Luke no longer contends that Kesha's statements about his emotional abuse are defamatory. Those claims must be dismissed.

STATEMENT OF FACTS

The Morning After The Sexual Assault

When Kesha woke up in Dr. Luke's hotel room on October 6, 2005, he was long gone.² His claim that he told his then-girlfriend that Kesha "crash[ed] in [his] room" is a lie according to his then-girlfriend's testimony.³ Terrifyingly, Kesha felt as though her vagina was "ripped" and "something had been inserted...without proper lubrication."⁴ Her "body was aching and [she] was vomiting up green stomach acid."⁵ Drug-facilitated sexual assaults ("DFSA") occur when a victim is unable to provide consent, and is a common form of victimization.⁶ Vaginal pain or soreness is often what leads a DFSA victim to realize that an assault occurred.⁷

The undisputed evidence documents Kesha's reliance on her network of friends and family for emotional and physical support in the immediate aftermath of the horrifying assault:

- Kesha called her best friend *eight times* from Dr. Luke's hotel room.⁸ Julianne Hall testified that Kesha told her that she felt "like something happened," and when Ms. Hall picked Kesha up, Kesha said she remembered "taking some sort of pill."⁹ Ms. Hall also recalls Kesha saying repeatedly that her vagina hurt.¹⁰
- Kesha called her mother, Pebe Sebert, at least *five times*.¹¹ Pebe testified that Kesha said "I'm naked and I think we had sex. And I can't find my clothes and I need water and I need

² See Godesky Aff., Ex. 14 at 202-03, 210.

³ *Id.*, Ex. 14 at 189, 214; *see id.*, Ex. 13 at 63-65.

⁴ *Id.*, Ex. 6 at 238, 307, 309.

⁵ *Id.*, Ex. 6 at 293.

⁶ *See id.*, Ex. 20 at 6-8.

⁷ *See id.*, Ex. 20 at 9.

⁸ *See id.*, Ex. 66 at PLTS051784-85.

⁹ *Id.*, Ex. 8 at 40, 46.

¹⁰ *See id.*, Ex. 8 at 47.

¹¹ *See id.*, Ex. 66 at PLTS051784-85.

to go to the emergency room.”¹²

- Pebe called *her* friend, Mindy Rumph, “panicked.”¹³ Ms. Rumph testified that Pebe said “Kesha feels like she’s been date raped, and she was with Dr. Luke.”¹⁴

Kesha did not report the assault to law enforcement: she “recently had signed [her] life away to this man, and [she] was embarrassed and terrified and ashamed and sick.”¹⁵

Kesha’s experience with sexual assault is consistent with that of women across the country. The vast majority of female victims are first raped before the age of 25,¹⁶ and perpetrators are most likely to be intimate partners, family members, or persons in positions of authority.¹⁷ Empirical research shows that more than 80% of sexual assaults are never reported to law enforcement, and acquaintance-rape victims are even *less likely* to report.¹⁸ Failures to report sexual misconduct are particularly common in the entertainment industry, which has been marred for decades by a firmly entrenched casting-couch culture that preys on young, female aspiring artists.¹⁹ *False* reports of rape, on the other hand, are exceedingly rare, and Dr. Luke’s own sexual-assault expert acknowledges that the false-report incident rate is as low as 2%.²⁰

¹² *Id.*, Ex. 5 at 147-48.

¹³ *Id.*, Ex. 12 at 44.

¹⁴ *Id.*, Ex. 12 at 45.

¹⁵ *Id.*, Ex. 6 at 316.

¹⁶ *See id.*, Ex. 19 at 4.

¹⁷ *See id.*, Ex. 19 at 4-5.

¹⁸ *See id.*, Ex. 19 at 6 (studies show 16-20% of victims report to police).

¹⁹ *See, e.g., id.*, Ex. 85; *id.*, Ex. 173; *id.*, Ex. 174; *id.*, Ex. 176; *id.*, Ex. 177 (reporting star’s assertion that “unwillingness to give sexual favors hurt her career”); *id.*, Ex. 178 (reporting singer’s fear that career was over after she “fought off a lecherous producer”); *id.*, Ex. 179; *id.*, Ex. 180 (“[C]asting couch invitations ... came thick and fast when [Dolly Parton] first became a country singer”); *id.*, Ex. 181 (describing casting-couch culture effect on minors). New York courts routinely consider news articles at the summary-judgment stage. *See, e.g., Nekos v. Kraus*, 62 A.D.3d 1144, 1145 (3d Dep’t 2009) (summary judgment based partly on newspaper article submitted by defamation defendant); *Baker v. City of Elmira*, 271 A.D.2d 906, 909 (3d Dep’t 2000) (trial court erred in failing to consider newspaper articles); *Olin Corp. v. Lamorak Ins. Co.*, 2018 WL 3442955, at *15 (S.D.N.Y. July 17, 2018) (considering news articles to “show[] general industry knowledge”).

²⁰ *See Godesky Aff.*, Ex. 18 at 4.

Kesha's Only Post-Sexual-Assault Option Is Working With Dr. Luke

After the assault, Kesha tried desperately to sever her ties to Dr. Luke.²¹ She hired manager David Sonenberg of DAS Communications Ltd. (“DAS”)—of whom Dr. Luke did not approve²²—and told DAS that she would not work with Dr. Luke because he raped her.²³ But when Mr. Sonenberg negotiated a Warner Brothers deal, Dr. Luke enforced his KMI-contract rights to prevent Kesha from signing.²⁴ Realizing that Dr. Luke was her only option to release music, Kesha called Dr. Luke to apologize for hiring Mr. Sonenberg and pursuing the Warner Brothers contract.²⁵ They began working together again in approximately 2008, and DAS filed a lawsuit alleging (among other things) that Dr. Luke tortiously interfered with DAS's contract.²⁶

Dr. Luke Goes To Great Lengths To Establish Himself As a Celebrity Music Producer

Dr. Luke Is A Music-Industry Power Player By 2010

Between 2009 and 2010, Dr. Luke's career took off, as he produced and co-wrote songs for female artists like Kesha, Katy Perry, Miley Cyrus, Britney Spears, and Rihanna that topped the pop-music charts.²⁷ Industry giant ASCAP named Dr. Luke its 2010 Songwriter of the Year,²⁸ and Billboard dedicated its September 2010 cover to Dr. Luke, declaring him the “New Tycoon of Teen.”²⁹ By 2012, Billboard had named Dr. Luke the 30th most powerful person in

²¹ In 2005, Kesha signed an exclusive contract with Dr. Luke's music-production company, KMI, which required Kesha to use Dr. Luke to produce at least six songs on each of the first six albums she released. *See id.*, Ex. 26 § 9(a)(vi)(2) (“Artist shall not perform or render any services ... for any Person except Company.”); *id.*, Ex. 26 § 6(f) (Dr. Luke shall produce at least six recordings on each album). The contract was subsequently amended to require Dr. Luke's individual production services on five albums. *See id.*, Ex. 27 § 1.

²² *See id.*, Ex. 167 at VECTOR0263876; *id.*, Ex. 14 at 239; *id.* at 231-32; *id.* at 230 & 237.

²³ *See* Kesha Aff. ¶ 3; *see also* Godesky Aff., Ex. 44 at PLTS052440; *id.*, Ex. 14 at 234-36.

²⁴ *See* Godesky Aff., Ex. 14 at 246-248; *id.*, Ex. 48 at PLTS052457; *see also id.*, Ex. 45-46.

²⁵ *See id.*, Ex. 14 at 244-45.

²⁶ *See id.*, Ex. 166 at PLTS002931; *id.*, Ex. 11 at 198.

²⁷ *See, e.g., id.*, Ex. 22 at 9; *id.*, Ex. 23 at 16; *id.*, Ex. 65 at PLTS057007-10; *id.*, Ex. 16 at 4.

²⁸ *See id.*, Ex. 88 at KRS_ESI_0033945; *see also id.*, Ex. 89 at KRS_ESI_0033734.

²⁹ *See id.*, Ex. 90 at KRS_ESI_0033705.

the music industry.³⁰ And by 2014, Dr. Luke was mentioned in *hundreds* of news articles, including in *Billboard* and *Rolling Stone*,³¹ and his music-industry contributions were acknowledged in three books—including a four-chapter feature in a *NY Times*-reviewed book.³²

Approximately 168 songs produced or co-written by Dr. Luke were released between 2007 and 2014,³³ including more than 15 #1 hits.³⁴ Although Dr. Luke worked with dozens of artists,³⁵ young, female pop-music stars generated the majority of his income and fame. Between 2005 and 2017, Kesha, Katy Perry, Kelly Clarkson, Jessie J, and Avril Lavigne accounted for approximately 60% of Dr. Luke's and KMI's music-publishing income.³⁶

Dr. Luke Hires A Team Of Public-Relations Consultants To Establish His Public Figure

Dr. Luke sought to cement his wide-ranging fame outside the music industry. In the mid-2000s, during a ten-year run of television appearances as the lead guitarist on NBC's long-running hit, *Saturday Night Live*,³⁷ Dr. Luke claimed his "Dr. Luke" stage name,³⁸ and engaged publicist Linda Carbone at "Press Here" to promote his public image, complete with a "press kit."³⁹ By 2010, Dr. Luke added a management team from AAM to his bench of public-relations experts,⁴⁰ and engaged public-relations specialists at Sunshine Sachs on at least one occasion in connection with another defamation suit.⁴¹ In that case, Dr. Luke had Sunshine Sachs ensure that

³⁰ See *id.*, Ex. 91 at KRS_ESI_0034054.

³¹ See *id.*, Ex. 21 at 20 (North report determining Dr. Luke "mentioned in hundreds of recording industry articles"); see also *id.*, Ex. 21 at 55, Appendix B (article list).

³² See *id.*, Ex. 92 at North0000352; see also *id.*, Ex. 21 at 22-23 (North report listing books).

³³ See *id.*, Ex. 65 at PLTS057006-27 (Dr. Luke's Discography).

³⁴ See *id.*, Ex. 87 at North0000583.

³⁵ See *id.*, Ex. 65 at PLTS057006 (Dr. Luke's Discography).

³⁶ See *id.*, Ex. 24 at 31-32.

³⁷ See *id.*, Ex. 93 at KRS_ESI_0034037.

³⁸ See *id.*, Ex. 94 at KRS_ESI_0033742, KRS_ESI_0033755.

³⁹ See *id.*, Ex. 95 at North0000488.

⁴⁰ See *id.*, Ex. 96 North0000461.

⁴¹ See *id.*, Ex. 30 at MSK-SS000006.

TMZ was the first press outlet to release a story about Dr. Luke's suit.⁴²

In approximately 2010, Dr. Luke's celebrity exploded as he pursued a full-court-press media-relations effort. Dr. Luke consistently made himself available for public appearances:

- *Feature-length interviews with mainstream press outlets.* In June 2010, *New York Magazine* ran a 4-page feature that covered Dr. Luke's music-industry success and personal life.⁴³ Dr. Luke sat around the same time for a lengthy interview with *The Guardian*, during which Dr. Luke shared personal anecdotes about dealing drugs and getting expelled.⁴⁴ In fall 2013, *The New Yorker* declared "The Doctor Is In," publishing an 8-page spread containing lengthy interviews in Dr. Luke's beach house.⁴⁵ The profile's illustration depicted Dr. Luke surrounded by Britney Spears, Katy Perry, Miley Cyrus, and Kesha.⁴⁶
- *Photography Shoots.* In connection with an August 2010 *LA Times* article declaring the "Hits Keep Coming For Dr. Luke," Dr. Luke sat for a Getty Images-archived photoshoot.⁴⁷ Dr. Luke made himself available for a similar photography shoot for the September 2010 *Billboard* cover story lauding his arrival on the music scene.⁴⁸
- *Prime-time television.* In February 2011, Dr. Luke opened his studio for extensive interviews and video footage that played in a 7-minute feature on ABC World News Tonight and Nightline.⁴⁹ The narrator referred to him as "the man everyone calls Dr. Luke."⁵⁰
- *Cameos.* In 2012, Dr. Luke appeared throughout in a 40-minute video about the making of an Avril Lavigne song, and is shown skateboarding, drinking, and dancing.⁵¹ In spring 2013, Dr. Luke sat with Bill Maher and Clive Davis for *Sundance*'s "Iconoclasts."⁵²
- *Red-carpet interviews.* Dr. Luke agreed to participate in red-carpet interviews, including at the 2011 Grammys and ASCAP Pop Music Awards.⁵³
- *Radio and podcast interviews.* In fall 2010, Dr. Luke appeared on *NPR*'s Morning Edition

⁴² See *id.*, Ex. 30 at MSK-SS000014. Dr. Luke's history with Sunshine Sachs has not stopped him from claiming that Sunshine Sachs's similar release of Kesha's complaint to TMZ is defamatory. Unsurprisingly, Dr. Luke tried to keep his work with Sunshine Sachs—and rank hypocrisy—under wraps; Kesha only recently uncovered Dr. Luke's use of that same specialist.

⁴³ See *id.*, Ex. 97 at KRS_ESI_0033952.

⁴⁴ See *id.*, Ex. 98 at North0000026.

⁴⁵ See *id.*, Ex. 94 at KRS_ESI_0033742.

⁴⁶ See *id.*, Ex. 94 at KRS_ESI_0033742; see also *id.*, Ex. 21 at 17 (North report with portrait).

⁴⁷ See *id.*, Ex. 99 at North0000032; see also *id.*, Ex. 21 at 12.

⁴⁸ See *id.*, Ex. 90 at KRS_ESI_0033703.

⁴⁹ See *id.*, Ex. 101 KRS_ESI_0034151.

⁵⁰ See *id.*

⁵¹ See *id.*, Ex. 102 at KRS_ESI_0034171; see also *id.*, Ex. 21 at 41.

⁵² See *id.*, Ex. 103 at KRS_ESI_0034154; see also *id.*, Ex. 21 at 19.

⁵³ See *id.*, Ex. 104 at KRS_ESI_0034168; *id.*, Ex. 105 at KRS_ESI_0034185; *id.*, Ex. 21 at 18.

podcast.⁵⁴ In 2012, KIISFM introduced him as “the man, the myth, the legend, Dr. Luke.”⁵⁵

Dr. Luke’s carefully curated social-media profile prominently features his media-relations effort. Dr. Luke claimed the @TheDoctorLuke Twitter handle in 2009,⁵⁶ and has since tweeted more than 7,500 times⁵⁷—comparable to superstar Lady Gaga’s approximately 8,600 tweets, and dwarfing celebrity producer Simon Cowell’s approximately 2,000 tweets.⁵⁸ Dr. Luke tweeted about his personal and professional life to his hundreds of thousands of followers.⁵⁹

By 2014, Dr. Luke Successfully Establishes Himself As A Celebrity Public Figure And Influencer

University of Southern California Professor and traditional, digital, and social-media expert Karen North determined that Dr. Luke “clearly met the standard for celebrity by 2014, because he was by then well known by both the music industry and a wider, general public audience”; “his name and identity have value beyond the music industry.”⁶⁰ Dr. Luke’s formidable influencer status is reflected in at least four commercial and civic engagements:

- *Congressional public-policy briefing.* In 2010, the Grammys and Recording Academy selected Dr. Luke to represent the music industry during a congressional roundtable.⁶¹
- *American Idol.* In 2012, *Fox* announced that it had selected Dr. Luke as a judge on its iconic “American Idol” show,⁶² reflecting a judgment that Dr. Luke would be good for ratings.⁶³ Dr. Luke’s selection was widely covered by the press.⁶⁴
- *Hollywood Walk of Fame.* In July 2014, the Hollywood Chamber of Commerce selected Dr.

⁵⁴ See *id.*, Ex. 106 at KRS_ESI_0033968; see also *id.*, Ex. 21 at 19.

⁵⁵ See *id.*, Ex. 107 at KRS_ESI_0034173.

⁵⁶ See *id.*, Ex. 81 at KRS_ESI_0033818.

⁵⁷ See *id.*

⁵⁸ See *id.*, Ex. 82 at North0000495; *id.*, Ex. 83 at North0000582; *id.*, Ex. 21 at 26.

⁵⁹ See *id.*, Ex. 81 at KRS_ESI_0033818; see also, e.g., *id.*, Ex. 79 at North0000230 (promoting artists with tweet “@grl are killing it in the studio!”); *id.*, Ex. 80 at North0000296 (philosophically tweeting “my shrink told me” “we don’t solve problems just exchange them for new ones”).

⁶⁰ See *id.*, Ex. 21 at 5.

⁶¹ See *id.*, Ex. 109 at North0000314.

⁶² See *id.*, Ex. 110 at North0000185; *id.*, Ex. 172.

⁶³ See *id.*, Ex. 110 at North0000185.

⁶⁴ See *id.*, Exs. 110-121, 172, 193.

Luke for a star on the Hollywood Walk of Fame.⁶⁵ The selection committee targets individuals sure to draw tourist foot traffic.⁶⁶

- *Core Water*. By year-end 2014, Dr. Luke was a partner in the Core Water brand, and used his substantial influence to attract A-List celebrities like Katy Perry and DJ Khaled to serve as brand ambassadors.⁶⁷

Dr. Luke knew full well during these years that he had achieved full-blown celebrity and fame, going out of his way to tout it. He described himself in court papers as famous,⁶⁸ claiming to have “received international acclaim and respect from his peers in the music entertainment industries and from the public at large.”⁶⁹ Dr. Luke even wondered if some of his successes were due to his general celebrity, rather than talent: In 2010, he confided to a reporter that he “often think[s] about secretly producing under a different name...to see how it’s perceived.”⁷⁰

Kesha’s Professional Success Is Wrecked By Dr. Luke’s Continued Abuse

Kesha achieved enormous professional success between 2010 and 2013 with her first two hit albums, *Animal* and *Warrior*.⁷¹ Dr. Luke’s unrelenting campaign to shatter her self-confidence, however, defined their relationship.

The DAS Litigation Deposition. Dr. Luke threatened to harm Kesha and her family’s livelihood if she disclosed the 2005 sexual assault during a June 2011 deposition in the DAS tortious-interference litigation.⁷² Kesha believed Dr. Luke’s threat to be very real: “[h]is weapon was my life”; “that’s what he was threatening to take away from me, my career, my life

⁶⁵ See *id.*, Ex. 127 at North0000259; *id.*, Ex. 128 at North0000251.

⁶⁶ See *id.*, Ex. 129 at North0000133.

⁶⁷ See *id.*, Ex. 130 at North0000331 (“Award winning ... entrepreneur Lance Collins and award winning producer and songwriter Lukasz Gottwald, aka Dr. Luke, have joined forces to launch CORE Natural® Water.”); *id.*, Ex. 131 at North0000327 (“Core ... has signed on Katy Perry Diplo Becky G and producer Max Martin as music brand ambassadors and investors.”).

⁶⁸ See *id.*, Ex. 168 at KRS_ESI_0034352 (Dr. Luke is “visible public target[] by virtue of [his] fame and success”).

⁶⁹ See *id.*, Ex. 169 at KRS_ESI_0034344.

⁷⁰ See *id.*, Ex. 97 at KRS_ESI_0033957.

⁷¹ See *id.*, Ex. 22 at 9.

⁷² See *id.*, Ex. 6 at 48-53.

— the livelihood of my family. ... [I]f I wasn't a good girl [who] answer[ed] exactly how he instructed me ..., he had the ability to take it away.”⁷³ She therefore testified that Dr. Luke “never made sexual advances.”⁷⁴ This type of false testimony frequently occurs in matters of interpersonal victimization, particularly when victims fear retaliation.⁷⁵

Warrior Recording Sessions. In May 2012, Kesha's former manager, Monica Cornia, reported that Dr. Luke was “put[ting Kesha] through a lot of hell.”⁷⁶ Kesha wouldn't “let [Ms. Cornia] leave any studio session,” because Kesha was scared to be alone with Dr. Luke.⁷⁷ As work on *Warrior* continued, Kesha reiterated her never-left-alone directive,⁷⁸ and Ms. Cornia told her boss that being around Dr. Luke every day was “insane”: “I've seen a good deal of sh*t in my life but nothing like this ever!!”⁷⁹

Unrelenting Criticism Of Kesha's Appearance. Dr. Luke told Kesha “[y]ou look disgusting” during “pretty much the entirety of *Warrior*.”⁸⁰ He insisted that Kesha exercise while other team members ate, because she “didn't deserve to eat food.”⁸¹ Dr. Luke called her “[h]uge” and “fat,”⁸² and even knocked a fork out of her hand mid-bite at a public restaurant.⁸³

Kesha Seeks Medical Help Regarding The 2005 Rape and Abusive Dynamic

It is common for a sexual-assault survivor to tell close friends or family about a

⁷³ *Id.*, Ex. 6 at 52-53; *see also id.*, Ex. 5 at 46-49 (Pebe testifying about Dr. Luke's refusal to let her write Kesha's singles); *id.*, Ex. 29 at VECTOR0253894-95.

⁷⁴ *Id.*, Ex. 152 at 13.

⁷⁵ *See id.*, Ex. 19 at 18 (Hughes opining: “In cases of interpersonal violence that reach the court system ..., a substantial proportion of victims either recant or fail to cooperate with prosecution efforts.”).

⁷⁶ *Id.*, Ex. 38 at VECTOR0133808.

⁷⁷ *Id.*, Ex. 38 at VECTOR0133808; *see also id.*, Ex. 6 at 129.

⁷⁸ *See id.*, Ex. 39 at VECTOR0134700.

⁷⁹ *Id.*, Ex. 40 at VECTOR0136248; *see also id.* Exs. 41-43.

⁸⁰ *Id.*, Ex. 6 at 126-27.

⁸¹ *Id.*, Ex. 6 at 127.

⁸² *Id.*, Ex. 6 at 127.

⁸³ *See id.*, Ex. 6 at 131.

victimization experience close in time to its occurrence, and tell others at a later time.⁸⁴ As Kesha entered her mid-twenties, she began seeing licensed-therapist [REDACTED],⁸⁵ and reported Dr. Luke's 2005 rape and subsequent abuse.⁸⁶ On December 12, 2011, Kesha confided that she recalled "waking up in hotel room naked...[where she felt] as though something sexual might have happened."⁸⁷ Kesha told [REDACTED] that she never discussed the incident with Dr. Luke because she was "scared of him."⁸⁸ [REDACTED] notes from Kesha's 2011-2012 sessions reflect extensive discussion of Dr. Luke's abuse. For example, (i) in April 2011, Kesha reported that Dr. Luke "described her as 'huge,'" and she was at a point where she "want[ed] to have plastic surgery"⁸⁹; and (ii) in December 2011, Kesha discussed "how [Dr. Luke] often made mean comments about her body and insulted her."⁹⁰

In early 2014, Kesha entered Timberline Knolls for eating-disorder treatment.⁹¹ When her mother commented to the press that "Dr. Luke had been telling [Kesha] how she had to get in shape and lose weight,"⁹² Dr. Luke turned to his public-relations team at Press Here and AAM to

⁸⁴ See *id.*, Ex. 19 at 9 (citing Lanthier, Du Mont & Mason 2016; Bicanic et al. 2015).

⁸⁵ See *id.*, Ex. 15 at 29.

⁸⁶ See, e.g., *id.*, Ex. 53 at KRS_MED_000918 (12/12/11: "Client stated she had memory of producer slipping drugs into her drink one night and waking up in hotel room naked. She called mother, but she did not know where she was. Client described feeling as though something sexual might have happened."); *id.*, Ex. 54 at KRS_MED_000919 (3/5/12: "[P]roducer is often critical of everything about client including her weight."); *id.*, Ex. 55 at KRS_MED_000921 (6/12/12: "Upset with producer[.] [F]eels belittled, abused[.] [W]oke up with anxiety attack."; 6/22/12: "Client reports producer has been sexually and verbally abusive, but she is scared of him and does not want him to lash out at her mother if she confronts him."); *id.*, Ex. 56 at KRS_MED_000924 (3/10/14: "[R]eports escalating anger toward producer whom she believes sexually [sic] abused her and tormented her about her body and her weight for years."; 3/11/14: "Client ... reports that he drugged her, and that she woke up naked in a hotel room with no memory of getting there. She could tell she had had sex, but she had no memory of it."); *id.*, Ex. 57 at KRS_MED_000926; *id.*, Ex. 58 at KRS_MED_000942; *id.*, Ex. 59 at KRS_MED_000943.

⁸⁷ *Id.*, Ex. 53 at KRS_MED_000918.

⁸⁸ *Id.*, Ex. 53 at KRS_MED_000918.

⁸⁹ *Id.*, Ex. 52 at KRS_MED_000916.

⁹⁰ *Id.*, Ex. 53 at KRS_MED_000918.

⁹¹ See *id.*, Ex. 6 at 62.

⁹² *Id.*, Ex. 207 at 1.

draft a public response.⁹³ While at Timberline Knolls, Kesha reported (i) “[v]erbal/emotional abuse” by “Record label ‘guy’”; and (ii) that she was “date raped by business associate @ age 18.”⁹⁴ Kesha “present[ed] with many features of a battered woman in her relationship with producer. Sexual violence and severe emotional abuse have been part of that relationship.”⁹⁵

Kesha Is Not Alone In Her Experience With Dr. Luke

Kesha’s experience with Dr. Luke’s abuse is not unique. Kelly Clarkson characterizes Dr. Luke as “kind of a bully and demeaning.”⁹⁶ Ms. Clarkson revealed that “*almost every female at [RCA] doesn’t like working with him,*” and when RCA threatened to “sit on [her] album” if she didn’t use Dr. Luke as a producer, she made it clear that she “didn’t want to talk to him,” requested “a buffer,” and had “[n]ot one” interaction with him.⁹⁷ Ms. Clarkson’s disputes with Dr. Luke and the then-head of Sony-affiliate RCA Records were widely reported.⁹⁸ P!nk similarly reports that Dr. Luke is “not a good person”; she “do[es] not work with him.”⁹⁹

Kesha Attempts To Settle Her Claims Against Dr. Luke Outside The Public Eye

In fall 2013, shortly before entering Timberline Knolls, Kesha engaged attorneys to represent her in negotiations aimed at eliminating her contractual obligation to work directly with Dr. Luke.¹⁰⁰ Kesha’s attorney Kenneth Meiselas approached Sony¹⁰¹ General Counsel Julie

⁹³ See *id.*, Ex. 36 at PLTS212144-46; *id.*, Ex. 37 at PLTS212151.

⁹⁴ *Id.*, Ex. 49 at KRS_MED_000023; *id.*, Ex. 50 at KRS_MED_000031.

⁹⁵ *Id.*, Ex. 51 at KRS_MED_000847.

⁹⁶ See Godesky Aff., Ex. 4 at 17, 20; see, e.g., *id.*, Ex. 194.

⁹⁷ See *id.*, Ex. 4 at 21, 23-24, 30.

⁹⁸ See, e.g., *id.*, Ex. 182; see also *id.*, Ex. 208 at 506 (“[Y]ou have to take direction. Kelly didn’t like it. Max and Luke were merciless. ... [F]rom her perspective, she had a horrible experience in the studio. She’d never work with them again.”); see *id.*, Ex. 183; see *id.*, Ex. 184; see *id.*, Ex. 185 (Clarkson recounts Davis “told [her] verbatim that [she] was a ‘s---ty writer who should be grateful for the gifts that he bestows upon [her].’”); see *id.*, Ex. 186 (“I [] find it sickening. ... Can’t [Davis] sort of tell his story without f**king degrading her and putting her down?”).

⁹⁹ See *id.*, Ex. 187.

¹⁰⁰ See *id.*, Ex. 9 at 32; *id.*, Ex. 9 at 60.

¹⁰¹ Mr. Meiselas approached Sony because Sony-affiliate RCA obtained a financial interest in Kesha’s music in 2009. See *id.*, Ex. 25 at VECTOR0000051.

Swidler to explain that Kesha could no longer work with Dr. Luke because he was “abusive towards her verbally and physically.”¹⁰² Mr. Meiselas sought to settle Kesha’s claims by papering an agreement under which Kesha would not have to work directly with Dr. Luke.¹⁰³ Remarkably, immediately after Sony heard Kesha’s sexual-assault and abuse claims, Sony entered a joint-defense agreement with Dr. Luke.¹⁰⁴

Ms. Swidler viewed her communications with Mr. Meiselas as “related to settlement,” and believed they were “covered by a settlement privilege.”¹⁰⁵ In February 2014, Ms. Swidler sent a draft settlement agreement under which Kesha would release music with Dr. Luke “no longer [having] any obligation to produce,” in exchange for a non-disparagement agreement.¹⁰⁶ The parties exchanged draft settlement agreements in spring 2014,¹⁰⁷ and Ms. Swidler asked in June 2014 to see a copy of the complaint that Kesha’s litigation counsel, Mark Geragos, would file if there were no settlement.¹⁰⁸ During a pre-meeting with Sony CEO Doug Morris, Ms. Swidler told Mr. Morris that the dispute hadn’t been settled because “Luke’s very difficult, something to that effect.”¹⁰⁹ Mr. Meiselas later showed Ms. Swidler a draft complaint that named Dr. Luke and his companies, along with various Sony entities (the “Draft Complaint”).¹¹⁰

After receiving and reviewing the Draft Complaint, Dr. Luke did not accuse Kesha of extortion or defamation, or call the police or FBI to report extortion. Nor did he terminate the

¹⁰² *Id.*, Ex. 9 at 71; *see also id.*, Ex. 31 at GSM000102.

¹⁰³ *See id.*, Ex. 9 at 54-55 (“We didn’t try and renegotiate the terms of her agreement ... in the traditional music way of seeking greater advances, royalties, changing her deal.... [T]hat was never part of our conversation”); *see also id.*, Ex. 10 at 248.

¹⁰⁴ *See id.*, Ex. 209 at 1.

¹⁰⁵ *Id.*, Ex. 3 at 34-35.

¹⁰⁶ *Id.*, Ex. 34 at PLTS053640.

¹⁰⁷ *See id.*, Ex. 35 at GSM001070.

¹⁰⁸ *See id.*, Ex. 9 at 151 (Meiselas: Swidler called him and said, “I’d like to see the complaint”); *see also id.*, Ex. 32 at GSM001142.

¹⁰⁹ *Id.*, Ex. 9 at 154.

¹¹⁰ *See id.*, Ex. 9 at 173; *see also id.* Ex. 47 at KRS_ESI_0034379.

settlement discussions. To the contrary, in early-September 2014, Dr. Luke's counsel circulated a long-form settlement agreement.¹¹¹ Settlement negotiations terminated, however, when the parties could not agree on a liquidated-damages non-disparagement clause that Dr. Luke sought to enforce against not only Kesha but anyone who speaks in her defense, many of whom she does not and cannot control.¹¹²

Kesha Initiates California Litigation Against Dr. Luke

On October 14, 2014, Kesha filed a California state-court complaint against Dr. Luke and Kemosabe Records (the "California Complaint").¹¹³ As is common in litigation involving celebrities,¹¹⁴ and a tactic Dr. Luke has himself deployed in other cases, an advance copy was provided to TMZ under an express embargo, so that TMZ could publish immediate coverage.¹¹⁵ The California Complaint asserted eight causes of action, and reflected Kesha's claim that Dr. Luke committed sexual assault and battery.¹¹⁶ The California Complaint further alleged that Dr. Luke intentionally inflicted emotional distress, including through cruel criticism of her weight.¹¹⁷

Dr. Luke Retaliates With Litigation And A Highly Sophisticated Public-Relations Strategy

Dr. Luke responded on October 14, 2014 with a retaliatory New York defamation lawsuit and no-holds-barred public-relations strategy.¹¹⁸ Dr. Luke expanded his team of public-relations experts to include Michael Sitrick,¹¹⁹ a public-relations veteran about whom the *NY Times* recently wrote "[e]ven if you don't know his name, you know his work."¹²⁰ Dr. Luke and his

¹¹¹ See *id.*, Ex. 33 at GSM000775.

¹¹² See *id.*, Ex. 33 at GSM000781-87.

¹¹³ See *id.*, Ex. 154 at 1-4.

¹¹⁴ See *id.*, Ex. 2 at 225 (Falkenstein: "[I]t's very common in litigation [between celebrities] that an outlet would be given an embargo[ed] complaint shortly ahead of the filing.").

¹¹⁵ See *id.*, Ex. 30 at MSK-SS000014-15; *id.*, Ex. 214 at SSA010948.

¹¹⁶ See *id.*, Ex. 154 at 12-17.

¹¹⁷ See *id.*, Ex. 154 at 8-9, 22-24.

¹¹⁸ See *id.*, Ex. 132 at 7.

¹¹⁹ *Id.*, Ex. 60 at SSA002097; *id.*, Ex. 63 at SSA002108.

¹²⁰ *Id.*, Ex. 189 at 1.

representatives immediately deployed a barrage of public statements intended to disparage Kesha and her claims—a strategy that has continued to this day.¹²¹

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Kesha Asserts New York Counterclaims After The California Case Is Stayed

In fall 2014, Dr. Luke and Kemosabe Records moved to dismiss or stay the California litigation, citing New York forum-selection clauses in Kesha’s contracts.¹²⁵ Kesha opposed those motions,¹²⁶ and participated in a telephonic court conference regarding a potential amendment that would overcome Dr. Luke’s forum-selection-clause argument.¹²⁷ Kesha also

¹²¹ See, e.g., *id.*, Ex. 190 at 4 (Kesha’s claims “nothing more than a continuation of [Kesha’s] bad and offensive acts”); *id.*, Ex. 202 at 1 (claims “spectacular and outrageous fiction”); *id.*, Ex. 213 at 14 (filing motion to unseal selected DAS litigation testimony); *id.*, Ex. 203 at 3; *id.*, Ex. 133 at 2 (publicly filed exhibit to amended complaint attaching birthday card from Kesha); *id.*, Ex. 204 at 1 (TMZ.com describing “over-the-top lovey dovey birthday card that makes it seem like their relationship is anything but abusive”); *id.*, Ex. 205 at 3 (declaring there is “no evidence, whether from doctors or anyone else, to support” Kesha’s abuse allegations”); *id.*, Ex. 86 at KRS_ESI_0034145 (accusing “Kesha and her attorneys” of “deceiving the public”); *id.*, Ex. 206 (accusing Kesha of “fil[ing] a baseless lawsuit” based on “fabricated claims for rape”).

[REDACTED]

[REDACTED]

[REDACTED]

¹²⁵ See, e.g., Godesky Aff., Ex. 155.

¹²⁶ See, e.g., *id.*, Ex. 156.

¹²⁷ *Id.*, Ex. 159 at 4 (Geragos: referencing May 7 teleconference and noting “the New York judge recognized there is a significant issue as to the Sony forum-selection clause, which may negate the Luke Kesha forum-selection clause”).

appeared in California court on May 21, 2015, and convinced the court to defer decision on the forum-selection-clause issue.¹²⁸ On June 8, 2015, Kesha filed an amended complaint.¹²⁹ On June 16, 2015, the California court stayed the litigation based on its finding that Kesha's "claims come within the scope of the [contracts'] forum selection clauses."¹³⁰ The California court made no determination regarding the merits of Kesha's claims, and set a status conference to discuss progress in New York.¹³¹ Kesha thereafter appeared in at least five California conferences.¹³²

In July 2015, Kesha asserted New York tort counterclaims based on the rape, drugging, and abuse allegations pleaded in California.¹³³ Anticipating a time-barred response, Kesha's First Amended Counterclaims alleged that a statute-of-limitations dismissal motion would be meritless.¹³⁴ Kesha opposed the motion to dismiss,¹³⁵ but on April 6, 2016, the Court dismissed her claims, primarily on statute-of-limitations and subject-matter-jurisdiction grounds.¹³⁶

Kesha's Preliminary-Injunction Motion

In fall 2015, Kesha filed a New York motion seeking a preliminary injunction permitting her to work with producers and record labels unrelated to Dr. Luke.¹³⁷ Around the same time, Michael Eisele, a then-17-year-old Kesha fan who had become a family friend,¹³⁸ posted seven tweets supporting Kesha.¹³⁹ Kesha neither directed nor authorized, and had no advance

¹²⁸ *Id.*, Ex. 159 at 7 (Geragos requesting court defer decision on dismissal motion).

¹²⁹ *See, e.g., id.*, Ex. 160.

¹³⁰ *Id.*, Ex. 161 at 10.

¹³¹ *See, e.g., id.*, Ex. 161.

¹³² *See, e.g., id.*, Ex. 157; *id.*, Ex. 158; *id.*, Ex. 162; *id.*, Ex. 163; *id.*, Ex. 164.

¹³³ *See, e.g., id.*, Ex. 135.

¹³⁴ *See, e.g., id.*, Ex. 137.

¹³⁵ *See, e.g., id.*, Ex. 139; *see also id.*, Ex. 138.

¹³⁶ *See, e.g., id.*, Ex. 142.

¹³⁷ *See id.*, Ex. 136, 191.

¹³⁸ *Id.*, Ex. 150 ¶ 4.

¹³⁹ *See, e.g., id.*, Ex. 67, 69-74.

knowledge of, Mr. Eisele's tweets.¹⁴⁰ Pebe also posted four re-tweets supporting Kesha¹⁴¹ that Kesha did not direct, authorize, or have advance knowledge of.¹⁴²

Kesha Devotes Substantial Resources To Pursuing Her Claims In New York

A few months later, Kesha voluntarily dismissed the California Complaint without prejudice, given the California judge's statement that Kesha already had her day in court in New York and call for dispositive motions.¹⁴³ The voluntary dismissal was aimed at avoiding futile motion practice, reducing legal costs, and pursuing Kesha's New York claims.¹⁴⁴ Kesha did not want to dismiss the case: she was "resigned" due to a lack of viable alternatives, and "adamant ... that the public know she is still fighting her claims."¹⁴⁵ The dismissal was not "a retraction of any sort."¹⁴⁶ Kesha's attorneys had spent substantial time on the California litigation.¹⁴⁷

Since then, Kesha has never wavered in New York with regard to her rape and abuse allegations. She has spent four years defending them, incurring millions of dollars in attorneys' fees and expenses.¹⁴⁸ For example, Kesha (i) pleaded the truth of her statements,¹⁴⁹ and pursued at significant cost supportive discovery, including tens of thousands of dollars on sexual-assault experts¹⁵⁰; (ii) filed a January 30, 2017 motion for leave to amend her counterclaims based on Dr. Luke's verbal abuse and physical threats¹⁵¹; and (iii) appealed the denial of her motion.¹⁵² Kesha did not further press counterclaims based on the 2005 rape because this Court had already

¹⁴⁰ *Id.*, Ex. 150 at ¶¶ 4-12; *see, e.g., id.*, Ex. 149.

¹⁴¹ *See, e.g., id.*, Ex. 67, 75-77.

¹⁴² *Id.*, Ex. 150 at ¶¶ 3, 13-16; *see, e.g., id.*, Ex. 148.

¹⁴³ *See id.*, Ex. 165; *see also id.* Ex. 175; *see also* Pearl Aff. ¶ 6.

¹⁴⁴ *See* Godesky Aff., Ex. 175 at 2; *see also* Kesha Aff. ¶ 4.

¹⁴⁵ Godesky Aff., Ex. 64 at SSA011303; *see also id.*, Ex. 192.

¹⁴⁶ *Id.*, Ex. 64 at SSA011303.

¹⁴⁷ *See* Pearl Aff. ¶¶ 4-5.

¹⁴⁸ *See id.* ¶¶ 4-5.

¹⁴⁹ *See* Godesky Aff., Ex. 145 at 23; *see id.*, Ex. 153 at 38.

¹⁵⁰ *See* Pearl Aff. ¶ 6.

¹⁵¹ *See* Godesky Aff., Ex. 143.

¹⁵² *See id.*, Ex. 146; *see id.*, Ex. 147.

determined that the statutes of limitations expired. *See supra* 16. Indeed, any such motion would likely have led to sanctions, given the prior dismissal ruling.

The TAC's Defamation Allegations

Dr. Luke's January 30, 2017 Second Amended Complaint ("SAC") sought to hold Kesha liable for only pre-litigation statements, other than a 2016 text message.¹⁵³ In fact, Dr. Luke *specifically limited* his defamation claim to alleged "Statements Published Prior To The Commencement Of This Action."¹⁵⁴ On August 31, 2018, one month before the note of issue, the Court permitted Dr. Luke to file a Third Amended Complaint ("TAC") based on dozens of new statements nowhere identified in the SAC.¹⁵⁵

ARGUMENT

Partial summary judgment is appropriate when no material questions of fact exist regarding discrete issues. *See* CPLR 3212(e) (permitting summary judgment "as to one or more causes of action, or part thereof"). Kesha is entitled to partial summary judgment that (i) Dr. Luke is a public figure who cannot prevail unless he proves Kesha's actual malice; (ii) 25 statements are privileged; (iii) 18 statements are non-actionable opinion statements; (iv) she is not liable for 14 statements by Pebe and Mr. Eisele, because neither was authorized to act on her behalf; (v) her alleged statements about Dr. Luke's emotional and verbal abuse must be dismissed as non-actionable; and (vi) 35 statements are time-barred.

I. THE COURT SHOULD ENTER JUDGMENT THAT DR. LUKE IS A PUBLIC FIGURE WHO MUST PROVE ACTUAL MALICE.

"[T]he constitutional command of the First Amendment" imposes a higher burden on a "public figure" who asserts a defamation claim than on his private counterpart. *Gertz v. Robert*

¹⁵³ *Id.*, Ex. 144 at 20-22.

¹⁵⁴ *Id.*, Ex. 144 at 20.

¹⁵⁵ *See id.*, Ex. 151.

Welch, Inc., 418 U.S. 323, 335-36, 349 (1974). To properly “assure to the freedoms of speech and press that breathing space essential to their fruitful exercise,” a public-figure plaintiff must prove—by clear and convincing evidence—that allegedly defamatory statements were both false and made with “actual malice.” *Id.* at 334-35, 342. Because “the question of a plaintiff’s status as a public figure is one of federal constitutional law,” *Lee v. City of Rochester*, 663 N.Y.S.2d 738, 743 (N.Y. Sup. Ct. 1997), *aff’d*, 254 A.D.2d 790 (4th Dep’t 1998), “states are entitled to provide a broader, though no more constricted, meaning to public figures than federal law provides.” *Cummins v. Suntrust Capital Mkts., Inc.*, 649 F. Supp. 2d 224, 240 (S.D.N.Y. 2009), *aff’d*, 416 F. App’x 101 (2d Cir. 2011). Accordingly, “an examination of both federal and state cases must be made for adequate guidance.” *Lee*, 663 N.Y.S.2d at 769.¹⁵⁶

As the Court of Appeals observed in its seminal public-figure analysis, “[t]he category of ‘public figures’ is of necessity quite broad.” *James*, 40 N.Y.2d at 422. The undisputed facts establish that Dr. Luke necessarily qualifies.

A. Dr. Luke’s Efforts To Attract Public Attention Render Him A Public Figure For All Purposes, And Certainly For His Conduct As A Music Producer.

A public figure is one “who assume[s] [a] role[] of special prominence in the affairs of society.” *Wilsey v. Saratoga Harness Racing, Inc.*, 140 A.D.2d 857, 858 (3d Dep’t 1988). He has “voluntarily abandon[ed] anonymity in favor of the public spotlight and its attendant heat.” *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 n.42 (3d Cir. 1980).

Although the public-figure inquiry is largely “unsusceptible to the application of rigid or mechanical rules,” N.Y. Pattern Jury Instructions 3:23 cmt., “[t]he critical consideration...is whether the evidence demonstrates that [the] plaintiff had taken affirmative steps to attract personal attention or had strived to achieve a measure of public acclaim.” *Maule v. NYM Corp.*,

¹⁵⁶ “When the facts are not in dispute,” the public-figure determination “should be made by the court.” *Curry v. Roman*, 217 A.D.2d 314, 319 (4th Dep’t 1995).

54 N.Y.2d 880, 881-82 (1981); *James*, 40 N.Y.2d at 422 (similar consideration). Where a plaintiff has “thrust h[im]self into the public spotlight and sought a continuing public interest in [his] activities” through “purposeful activity,” he is a public figure. *James*, 40 N.Y.2d at 423.

The justification for applying the “actual malice standard” to public figures is two-fold. *First*, such personalities, due to the public’s proven preoccupation with them, are presumed to have media access to effectively rebut defamatory statements they believe are inaccurate or unsupported. *Gertz*, 418 U.S. at 344 (public figures have “more realistic opportunity to counteract false statements”). Unlike a private individual, a public figure is able to “resort to effective self-help.” *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 164 (1979). *Second*, a public figure, by “invit[ing] attention and comment,” “voluntarily expose[s] [himself] to increased risk of injury from defamatory falsehood concerning [him].” *Gertz*, 418 U.S. at 345. “[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry ‘Foul!’ when an opponent or an industrious reporter attempts to demonstrate the contrary.” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51-52 (1988). A public figure “[i]n a sense, assume[s] the risk of publicity, good or bad, as the case might be.” *Time, Inc. v. Johnston*, 448 F.2d 378, 380 (4th Cir. 1971).

Drawing on these rationales, courts have identified two strains of fame-seeking public figures. An individual may be so “pervasive[ly]” famous or notorious that he is deemed a public figure for “all purposes,” including for statements relating to private aspects of his life. *Gertz*, 418 U.S. at 351. And an unbroken line of controlling New York authorities has held that an individual’s fame need not be universal to catapult him to public-figure status. Rather, “the extent to which one becomes a public figure is a matter of degree.” 40 N.Y.2d at 423.

In *James*, for example, the Court of Appeals held that a belly dancer who took “an affirmative step to attract public attention” by agreeing to an interview for the “obvious purpose”

of “attract[ing] customers to the club” was a public figure—at least “with respect to accounts of her stage performances.” *Id.* at 422-23. The court expressly declined to determine whether the belly dancer was an “all purpose” public figure: Given the nexus between the alleged defamation and the field in which the plaintiff “welcomed publicity,” “it suffice[d] to say” that she was a public figure with respect to those activities. *Id.* at 423. Likewise, in *Park v. Capital Cities Communications, Inc.*, 181 A.D.2d 192, 197 (4th Dep’t 1992), the court determined that a doctor who “actively s[ought] media attention” and “invited favorable publicity for his practice” was a public figure—at least for purposes of an investigation into his practice. *See also* Bruce W. Sanford, *Libel and Privacy* § 7.4 (2d ed.) (“[C]ourts generally conclude that sports figures, entertainers and the like are ‘public figures’—at least for the purpose of publications relating to the cause of their fame or notoriety, basis for achievement or fitness for position.”).

Individuals engaged in a wide array of publicity-seeking endeavors are thus, “without doubt,” public figures. *James*, 40 N.Y.2d at 422. “Although such persons have not necessarily taken an active part in debates on public issues, they remain, nevertheless, persons in whom the public has continuing interest.” *Id.* New York courts have reached that conclusion over and again, requiring the following plaintiffs to satisfy the “actual malice” standard, for all purposes or with respect to the plaintiff’s public life:

- Sports Illustrated writer covering sporting events who sought publicity for his work, including by making numerous public appearances, *Maule*, 54 N.Y.2d at 883;
- art auctioneers, who “voluntarily thrust[] themselves into the limelight in seeking media attention for the auction,” *Curry*, 217 A.D.2d at 319;
- “very public and well-known” boxer “within the context of female boxing,” *Davis v. High Soc’y Magazine*, 90 A.D.2d 374, 384 (2d Dep’t 1982);
- licensed harness-track driver who was an “expert[]” in the field of harness racing, *Wilsey*, 140 A.D.2d at 858-59; *see also Dancer v. Bergman*, 246 A.D.2d 573, 574 (2d Dep’t 1998) (similarly finding licensed harness-race driver public figure);
- Ozzy Osbourne’s former doctor in light of media coverage of his practice, television

appearances, and roles as a doctor in several films, *Kipper v. NYP Holdings, Inc.*, 12 N.Y.3d 348, 353 n.3 (2009);

- “well known Irish comedian,” *Roche v. Mulvihill*, 214 A.D.2d 376, 377 (1st Dep’t 1995);
- Atkins-diet founder, whose books sold nearly 4 million copies, *Atkins v. Friedman*, 49 A.D.2d 852, 852 (1st Dep’t 1975);
- restaurant open to public seeking patrons, *see Themed Restaurants, Inc. v. Zagat Survey, LLC*, 781 N.Y.S.2d 441, 445 n.2 (N.Y. Sup. Ct. 2004), *aff’d*, 21 A.D.3d 826 (1st Dep’t 2005); and
- founder of Nation of Islam, who obtained “a public and prominent position in public affairs in general,” *Farrakhan v. N.Y.P. Holdings*, 638 N.Y.S.2d 1002, 1006 (N.Y. Sup. Ct. 1995), *aff’d*, 238 A.D.2d 197 (1st Dep’t 1997).¹⁵⁷

The undisputed facts establish that through Dr. Luke’s concerted efforts to seek publicity and influence, and the prominence he achieved, Dr. Luke became an all-purpose public figure—and certainly for statements related to his work as a celebrity music producer.

¹⁵⁷ Courts around the country are in accord, holding all the following plaintiffs to the “actual malice” standard: University of Georgia’s athletic director, *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 162 (1967) (plurality); pornography performer “[w]ith millions of Internet downloads, extensive publicity, and broad public exposure,” *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 888-89 (9th Cir. 2016); President Nixon’s best friend, who “played a substantial role in the former President’s financial affairs,” *Rebozo v. Wash. Post*, 637 F.2d 375, 379-80 (5th Cir. 1981); one-time guard with the Philadelphia Eagles football team, *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979); self-proclaimed “well known radio commentator” among listeners from the Filipino-American community of New York City, *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 177 (2d Cir. 2000); “well known film director and producer” accused of rape, *Ratner v. Kohler*, 2018 WL 105528 (D. Haw. Feb. 26, 2018); surfer who gained notoriety for “tackling exceptionally dangerous and difficult waves,” and who “publicly boasted of his own surfing skills,” *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1093 (D. Haw. 2007); writer who achieved “general fame or notoriety in the literary and journalistic community” for purpose of “her activities relating to literature, journalism and criticism,” *Adler v. Conde Nast Publ’ns, Inc.*, 643 F. Supp. 1558, 1564 (S.D.N.Y. 1986); actress who appeared on Star Trek, resulting in an action figure, trading card, and newspaper and magazine articles, *Carafano v. Metrosplash.com Inc.*, 207 F. Supp. 2d 1055, 1071-72 (C.D. Cal. 2002); head basketball coach at a prominent university, *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1121 (N.D. Cal. 1984); two Major League Baseball players, *Zimmerman v. Al Jazeera Am., LLC*, 246 F. Supp. 3d 257, 263 (D.D.C. 2017); and popular reporter, *San Antonio Exp. News v. Dracos*, 922 S.W.2d 242, 255 (Tex. App. 1996).

1. *Dr. Luke Achieved Extraordinary Success As A Celebrity Music Producer.*

Courts often begin by examining a plaintiff's public-facing career, including name recognition, the degree of success achieved within a field, and public accolades. *See Maule*, 54 N.Y.2d at 882 (considering writer's commercial success, awards, and other accolades); *Atkins*, 49 A.D.2d at 852 (considering professional success of Atkins-diet founder); *Manzari*, 830 F.3d at 888 (considering pornography star's download count).

Those metrics readily confirm Dr. Luke's general-purpose public-figure status. Dr. Luke is an enormously successful music producer, who became famous by producing hit songs for female pop-music artists. *See supra* 5. Hundreds of his songs have made the Billboard Top 10, including at least twenty #1 hits. *See id.* 6. Dr. Luke received numerous accolades: ASCAP named him Songwriter of the Year, and Billboard dedicated a cover story to him and named him to its 2012 list of powerful persons in the music industry. *See supra* 5. By 2014, Dr. Luke had been mentioned in hundreds of news articles, and his music-industry contributions were acknowledged in three books. *See id.* Contemporaries compared him to the Beatles.¹⁵⁸

2. *Dr. Luke Pursued A Public-Relations Strategy That Established Him As A Famous Public Figure.*

Dr. Luke's fame exploded far beyond his commercial success—in large part due to his remarkable knack for self-promotion. For more than a decade, Dr. Luke took “affirmative step[s] to attract public attention,” i.e., “[t]he essential element underlying the category of public figures.” *James*, 40 N.Y.2d at 422; *Gertz*, 418 U.S. at 345 (public figures “invite attention and comment”); *Curry*, 217 A.D.2d at 319 (auctioneers became public figures by “voluntarily thrusting themselves into the limelight in seeking media attention”).

From the mid-2000s onward, Dr. Luke hired at least four different public-relations

¹⁵⁸ *Godesky Aff.*, Ex. 94 at KRS_ESI_0033742, KRS_ESI_0033756-57.

teams—including a team headed by Michael Sitrick, a prominent public-relations expert with a long roster of celebrity clients. *See supra* 14. Armed with a deep bench of publicists and a stage name, Dr. Luke sought to cement his status as a celebrity by consistently pursuing media coverage. By way of example, Dr. Luke participated in (i) feature-length interviews with mainstream press outlets like *The New Yorker*; (ii) television appearances (including a 7-minute feature story on ABC World News Tonight); (iii) red-carpet interviews; and (iv) national radio and podcast broadcasts. *See id.* 7. Dr. Luke likewise cultivated a social-media profile to compliment his media-relations effort. @TheDoctorLuke had *hundreds of thousands* of followers, and his highly active account went far beyond those of private figures. *See supra* 8. *Cf. U.S. v. Cassidy*, 814 F. Supp. 2d 574, 586, 586 n.14 (D. Md. 2011) (“easily identifiable public figure” with “17,221 followers”).

Dr. Luke’s widespread media coverage renders his public-figure status beyond dispute. *See James*, 40 N.Y.2d at 422 (“Newspapers and magazines of general circulation necessarily report on persons upon whom public interest has fastened.”); *Kipper*, 12 N.Y.3d at 353 n.3 (media coverage, television appearances, and role in several films rendered doctor public figure). Moreover, Dr. Luke’s unfettered access to and exploitation of the media confirms that he (i) voluntarily assumed the risk of “adverse as well as favorable comment” by stepping into the spotlight, *Bell v. A.P.*, 584 F. Supp. 128, 132 n.10 (D.D.C. 1984), and (ii) can “resort to effective ‘self-help,’” *Wolston*, 443 U.S. at 164. Indeed, Dr. Luke routinely turned to his army of publicists to alert the media and shape their reports. *See supra* pp. 11-14.

3. *Dr. Luke’s Publicity Efforts Established Him As A Public Figure And Celebrity Influencer.*

Dr. Luke’s success in transferring his recognition and influence from one field to another is an irrefutable marker of his general-purpose public-figure status. *See Brewer v. Memphis Pub. Co., Inc.*, 626 F.2d, 1249 (5th Cir. 1980) (former professional football player who opened

restaurant bearing his name public figure). An array of commercial and civic engagements spanning distinct spheres of influence demonstrate Dr. Luke's formidable celebrity status. In the political arena, the Grammys and the Recording Academy selected Dr. Luke to lobby Congress. *See supra* 8; *see Carto v. Buckley*, 649 F. Supp. 502, 507 n.3 (S.D.N.Y. 1986) (lobbyist organization public figure). In the marketing space, Dr. Luke monetized his connections to other celebrity artists to fuel his involvement in CORE Water. *See supra* 9. Within the tourism industry, the Hollywood Chamber of Commerce selected Dr. Luke for a star on the Hollywood Walk of Fame, believing that he would increase tourist foot traffic. *See id.* 8. And within the broader entertainment industry, *Fox* made a widely covered 2012 announcement that it had selected Dr. Luke as an "American Idol" judge. *See id.*

Likewise, that Dr. Luke economically benefitted from his celebrity further confirms his status as a public figure. *See James*, 40 N.Y.2d at 423 (where plaintiff "welcomed publicity" as "beneficial to her economic interest" she must "be held to be a public figure"); *Park*, 181 A.D.2d at 197 (doctor became public figure by "invit[ing] favorable publicity for his practice"); *Alcor Life Extension Found. v. Johnson*, 136 A.D.3d 464, 464 (1st Dep't 2016) (cryogenics company became public figure subject to actual-malice standard because it publicized business).

4. *Dr. Luke Repeatedly Emphasized His Public-Figure Recognition And Celebrity Status.*

In the years before this lawsuit, Dr. Luke openly proclaimed his fame. In two 2011 federal-court complaints, he crowed about his "continuous international, widespread success, and accomplishment [that] is unparalleled in [his] field"; his "enviable status in the industry"; and his "international acclaim and respect from his peers both in the music entertainment industries *and from the public at large.*" *See supra* 9. Dr. Luke further blamed his "*fame* and success" for his being a "visible public target[]." *See id.* Dr. Luke even wondered as early as 2010—i.e., *before* his media coverage exploded—if his songs topped the charts only because of his celebrity. *See*

id. Far lesser concessions of fame are often deemed dispositive of the public-figure inquiry. *See Maule*, 54 N.Y.2d at 882 (writer public figure in part because “[b]y his own estimation he was one of the best known writers at *Sports Illustrated*”); *Celle*, 209 F.3d at 177 (radio commentator who characterized himself as “well known” public figure); *San Antonio*, 922 S.W.2d at 254-55 (reporter public figure based on concession of fame in prior litigation).

B. Dr. Luke Is A Public Figure Because He Injected Himself Into A Public Controversy At The Heart Of Kesha’s Allegedly Defamatory Statements.

The Supreme Court instructed in *Gertz* that public figures include individuals who “have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved.” 418 U.S. at 345. New York courts consider whether the plaintiff (i) “invited public attention to his views in an effort to influence others”; (ii) “voluntarily injected himself into a public controversy related to the subject of the litigation” and “assumed a position of prominence” therein; and (iii) “maintained regular and continuing access to the media.” *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136-37 (2d Cir. 1984); *accord Lee*, 663 N.Y.S.2d at 769-70; *see also Waldbaum v. Fairchild Publ’ns*, 627 F.2d 1287, 1297-98 (D.C. Cir. 1987) (articulating similar test). A public controversy is “a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.” *Waldbaum*, 627 F.2d at 1296, 1299-1300 (defining “viability of cooperatives” and company’s “innovative” policies as “overlapping” public controversies).¹⁵⁹ The “subject matter of [this] litigation,” *Lerman*, 745 F.2d at 136-37, was described by Dr. Luke in attempting to enforce

¹⁵⁹ Other representative public controversies include: deceptive business practices in the freezer-meat industry, *Brueggemeyer v. Am. Broad. Companies, Inc.*, 684 F. Supp. 452 (N.D. Tex. 1988); relative merits of a mass-produced product, *Bose Corp. v. Consumers Union*, 508 F. Supp. 1249 (D. Mass. 1981); proposed hog-production project, *McQuoid v. Springfield Newspapers Inc.*, 502 F. Supp. 1050 (W.D. Mo. 1980); local-fundraising effort, *Adams v. Frontier Broad Co.*, 555 P.2d 556 (Wyo. 1976); purchase of Florida hotel, *Church of Scientology of California v. Cazares*, 638 F.2d 1272 (5th Cir. 1981); and corruption in the jai alai industry, *Silvester v. Am. Broad. Companies Inc.*, 839 F.2d 1491 (11th Cir. 1988).

forum-selection and choice-of-law provisions against Kesha: in a binding legal admission, he stated the dispute “centers around contracts between Kesha and Plaintiffs.”¹⁶⁰

A serious public controversy exists over effective lifetime artist contracts and the treatment of artists by powerful industry executives—particularly where, as here, unfair and abusive treatment prevents an artist from producing valuable works for the public. *Cf. Foster v. Svenson*, 128 A.D.3d 150, 156-57 (1st Dep’t 2015) (creation of “artistic expression” matter of “public concern”); *Bensussen v. Tadros*, 2018 WL 2390162, at *3 (Cal. Super. Mar. 8, 2018) (allegations of rape and drugging by music producer “involve issues of widespread public interest”). Indeed, interminable personal-services contracts like Kesha’s are banned under California Labor Code Section 2855, which ensures that aspiring artists are held for no more than seven years to contracts executed when they are first “discovered.” *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225, 235 (Cal. Ct. App. 1944). This artist-treatment controversy has been a consistent focus of national reporting,¹⁶¹ and is especially acute with respect to the mistreatment of young, female artists by male executives and producers who wield enormous power over their careers. The entertainment and music industries have struggled for decades with a “casting couch” culture problem,¹⁶² and intense public interest in this topic is illustrated by the media’s long reporting on this controversy.¹⁶³ And “[t]here is no question that

¹⁶⁰ See Godesky Aff., Ex. 134 at 1.

¹⁶¹ See, e.g., *id.*, Ex. 188 (reporting formation of Recording Artists Coalition to eliminate oppressive recording-artist contracts); *id.*, Ex. 212 (covering Concert for Artists Rights); *id.*, Ex. 171 (“Courtney Love is threatening to become the music industry’s worst nightmare by challenging her contract with a music conglomerate”); *id.*, Ex. 196 (“Prince ... wanted out of the music contract he signed when he was only 19 years old and Warner Bros. was not budging ... The sparring was public and it played out on a global stage.”).

¹⁶² See *supra* n. 19.

¹⁶³ Illustrative reports include (i) a fall 2017 industry retrospective by The Daily Beast characterizing the “casting couch culture” as an “age-old epidemic that goes back decades,” and describing 1940s situations where the head of MGM told Judy Garland how to sing by placing his hand on her chest; (ii) a recent memoir by Atlantic Records’ first female A&R executive, who asserts she was fired in the 1980s when she refused to sit on a male colleague’s lap; (iii) a

violence towards women and rape in particular is a matter of paramount public concern.” *Doe v. Daily News, L.P.*, 632 N.Y.S.2d 750, 752 (N.Y. Sup. Ct. 1995).

Dr. Luke thrust himself to the forefront of that public controversy by obtaining continuing media coverage highlighting his relationships with the young, female mega-celebrity artists in his portfolio.¹⁶⁴ *See supra* 6-9. For instance, in 2012, Dr. Luke was featured prominently in a 40-minute video about the making of an Avril Lavigne song. Touting his studio relationship with Ms. Lavigne, Dr. Luke brags that they “drank three-quarters of a bottle of Jägermeister within ... a couple of hours. [Avril] drank ... a bottle of Limoncello. And we were just, you know, doing shots, and drinking. ... We were shitfaced, fucking drunk. ... I am Avril’s bitch, basically.”¹⁶⁵ Dr. Luke likewise publicized his songwriting dynamic with Kesha in a 2010 Billboard story: “Here’s the thing about Ke\$ha...[s]he’s really smart, and she knows some of the stuff is really stupid...Sometimes my job is to prevent people from changing stuff.”¹⁶⁶ Similarly, a fall 2013 *The New Yorker* profile quotes Dr. Luke discussing his artists’ twitter followers, and his control over their tweets.¹⁶⁷ The profile highlights Dr. Luke’s self-described relationships with his artists, and notes Dr. Luke’s “sour” joke about Kesha’s lackluster social-media presence, with Dr. Luke commenting “I haven’t heard from her in a while.”¹⁶⁸

Moreover, Dr. Luke used his outsize power and influence to publicly bind Kesha, a mega-celebrity, to oppressive contract terms. The KMI contract that Kesha signed (at age 18)

recent BBC examination of the “casting couch culture of LA” which reports an aspiring girl-band member left the industry after being harassed; (iv) a 1981 Associated Press article quoting Petite Charly McClain that “the music business is just like the movie business and its casting couch”; and (v) a 1997 report by English R&B singer Shola Ama that she initially feared her career was over after she “fought off a lecherous producer.” *See supra* n. 19.

¹⁶⁴ *See* Godesky Aff., Ex. 90 at 3 (Dr. Luke has primarily worked with female stars, commenting that his musical “taste is that of a 13-year-old girl.”).

¹⁶⁵ *Id.*, Ex. 102.

¹⁶⁶ *Id.*, Ex. 90 at KRS_ESI_003709.

¹⁶⁷ *Id.*, Ex. 94 at KRS_ESI_0033751-53.

¹⁶⁸ *Id.*, Ex. 94 at KRS_ESI_0033752.

grants KMI exclusive rights to produce her music, and requires Kesha to use Dr. Luke to individually produce at least six songs on every album that Kesha releases. *See supra* n. 21. While it is undisputed that music-industry custom and practice is to renegotiate “baby artist” contracts when an artist achieves enormous commercial success,¹⁶⁹ Dr. Luke has refused to alter the terms of the now-unconscionable contract. By engaging in that abusive management style, and publicly preventing a mega-celebrity like Kesha¹⁷⁰ from creating and releasing music unless she works with her abuser (or pays him for breaching the contract), Dr. Luke further injected himself into the artist-treatment public controversy.¹⁷¹

Finally, the statements at the heart of this suit relate directly to this artist-treatment public controversy. *See Lerman*, 745 F.2d at 136-37 (considering whether controversy “related to the subject of the litigation”). The press immediately linked Kesha’s statements to this controversy,¹⁷² and Dr. Luke’s expert characterizes Kesha’s statements as fitting a “preexisting narrative” about entertainment-industry abuse.¹⁷³ Indeed, by Dr. Luke’s own account, “[his] dispute centers around contracts between Kesha and Plaintiffs.”¹⁷⁴ At the very least then, Dr.

¹⁶⁹ *Id.*, Ex. 22 at 11; *id.* Ex. 10 at 195.

¹⁷⁰ Kesha was not the only artist forced to work with Dr. Luke; Kelly Clarkson, for example, suffered similar treatment. Unsurprisingly, Dr. Luke’s conduct with respect to Clarkson garnered significant media coverage, further cementing Dr. Luke’s role in the artist-treatment controversy. *See supra* n. 96-99.

¹⁷¹ Even if Dr. Luke had not sought sufficient publicity to be a *voluntary* public figure, his status as a “well-known,” “controversial” producer swept up in artist-abuse allegations, *see Daniel Goldreyer, Ltd., v. Dow Jones & Co.*, 259 A.D.2d 353, 353 (1st Dep’t 1999), would nevertheless render him an involuntary public figure. *See id.* (art restorer “well known in the profession, but not outside of it” involuntary public figure for statements related to his use of questionable techniques); *Dameron v. Washington Magazine*, 779 F.2d 736, 742 (D.C. Cir. 1985) (air-traffic controller involuntary public figure regarding accident); *Bensussen*, 2018 WL 2390162, at *6-7 (“alternative hip-hop music producer and disc jockey” public figure where accusations “involve[d] issues of widespread public interest: allegations of sexual assault and violence against women”).

¹⁷² *See Godesky Aff.*, Ex. 201.

¹⁷³ *Id.*, Ex. 17 at 11.

¹⁷⁴ *See Godesky Aff.*, Ex. 134 at 1.

Luke is necessarily a public figure for purposes of this suit.¹⁷⁵

C. Kesha's Statements Fall Within the Sphere of Legitimate Public Concern.

Under New York law, when the content of a false and defamatory publication is “arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition,” a plaintiff must show the defendant acted with “gross irresponsibility.” *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975).

Kesha's statements fall squarely within the sphere of legitimate public concern. In *Huggins v. Moore*, for example, the Court of Appeals applied the “gross irresponsibility” standard to an allegedly defamatory article related to Melba Moore's divorce: though a private matter, the divorce nonetheless provided “a platform for speaking out as a victim of an allegedly pervasive modern phenomenon of economic spousal abuse.” 94 N.Y.2d 296, 304-05 (1999); *see also Chalpin v. Amordian Press*, 128 A.D.2d 81, 83, 88 (1st Dep't 1987) (commentary on Jimmi Hendrix's production contracts “certainly...within the sphere of legitimate public concern”). Particularly in light of the “casting couch” culture of Hollywood, *see supra* n.19, Kesha's statements about Dr. Luke's abuse inescapably concern matters warranting public exposition. *See, e.g., Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 15 (2d Dep't 1985) (criminal conduct and justice matters of public concern); *Bryks v. Canadian Broad. Corp.*, 928 F. Supp. 381, 383 (S.D.N.Y. 1996) (“[A]llegations of sexual assault by a community religious leader on school-children surely are ‘of legitimate public interest and concern’”).

¹⁷⁵ At an absolute minimum, it is beyond dispute that Dr. Luke is a public figure with respect to statements made after he commenced and publicized this action. *See Colantonio v. Mercy Med. Ctr.*, 135 A.D.3d 686, 687-92 (2d Dep't 2016) (doctor public figure for statements made after lawsuit filed due to seeking publicity for his claims); *Blum v. State*, 255 A.D.2d 878, 880 (4th Dep't 1998) (professor public figure for statements made after lawsuit filed due to press release).

II. THE COURT SHOULD ORDER THAT 25 OF THE ALLEGEDLY DEFAMATORY STATEMENTS ARE PRIVILEGED UNDER NEW YORK LAW.

The statements for which Dr. Luke has sued Kesha are non-actionable as a matter of law, because it is undisputed that they were made (i) during settlement discussions as pertinent to good-faith anticipated litigation (2 statements); (ii) by Kesha in litigation filings (6 statements); or (iii) by Kesha or her attorneys to contextualize litigation developments (19 statements). *See Park Knoll Assocs. v. Schmidt*, 59 N.Y.2d 205, 208 (1983) (“A privileged communication is one which, but for the occasion on which it is uttered, would be defamatory and actionable.”).

A. The Qualified Pre-Litigation Privilege Protects Kesha From Liability.

“[N]o cause of action for defamation can be based on” pre-litigation statements, “[i]f the statements are pertinent to a good faith anticipated litigation.” *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 715 (2015). The privilege’s purpose is to “encourage[] potential defendants to negotiate with potential plaintiffs in order to prevent costly and time-consuming judicial intervention”; “[c]ommunication during th[e] pre-litigation phase should be encouraged and not chilled by the possibility of being the basis for a defamation suit.” *Id.* at 719. The privilege extends to an attorney’s pre-litigation communications with the press. *See Tacopina v. O’Keeffe*, 645 F. App’x 7, 8 (2d Cir. 2016); *Feist v. Paxfire, Inc.*, 2017 WL 177652, at *5 (S.D.N.Y Jan. 17, 2017). The qualified privilege precludes liability for (i) Mr. Meiselas’s pre-litigation publication of the Draft Complaint; and (ii) the pre-filing transmittal of the California Complaint to TMZ.

1. Kesha Had A Good-Faith Basis To Anticipate Litigation.

By June 2014, Kesha had a good-faith basis to anticipate litigation regarding Dr. Luke’s rape and abuse. Kesha had engaged in year-long settlement negotiations with Dr. Luke, Sony, and Kemosabe Records regarding Kesha’s request for a contract that required no direct contact with Dr. Luke. *See supra* 12-13. Dr. Luke, Sony, and Kemosabe Records took Kesha’s claims seriously: Sony’s General Counsel understood the negotiations to be covered by a settlement

privilege, and no one contemporaneously accused Kesha of seeking to defame or extort Dr.

Luke. *See id.* To the contrary, after reviewing the Draft Complaint, Dr. Luke expended significant resources drafting long-form settlement agreements. *See id.*

That behavior is wholly unsurprising. As the undisputed evidence shows, Kesha's 2005 rape claim is well-documented. Kesha immediately reported Dr. Luke's sexual assault to trusted confidants (as most rape victims do), and also reported to medical professionals as she matured and came to terms with the assault. *See supra* 3, 11. Kesha's abuse allegations are further substantiated by a record of contemporaneous third-party e-mails, therapy records, and first-hand accounts from other female artists who worked with Dr. Luke. *See supra* 9-12.

Nor did Kesha fail to pursue her claims in litigation. *See Feist*, 2017 WL 177652, at *6 (applying privilege and observing it was "not a case where plaintiff failed to move forward"). Kesha expended substantial resources to pursue her California claims, including by amending her complaint to buttress her California-is-the-proper-forum argument, opposing a motion to dismiss, and participating in at least seven court conferences. *See supra* 14-16; *see also Feist*, 2017 WL 177652 at *6 (noting parties "submitted multiple expert reports and voluminous submissions in support of and opposition to the merits of [the defamation defendant's] claims"). Kesha's voluntary dismissal of the California case is irrelevant to whether the privilege applies. *See Lombardo v. Dr. Seuss Enterprises, L.P.*, 2017 WL 1378413, at *8 (S.D.N.Y. Apr. 7, 2017) ("whether or not defendant ultimately prevails...[it] had a good faith basis for" pre-litigation communications). It is undisputed that the California court invited a motion to dismiss and directed Kesha to litigate in New York. *See supra* 17. It is also undisputed that Kesha lacks the resources to litigate in multiple jurisdictions, and by fall 2016, she could focus only on the more-advanced-stage New York litigation, where she has since vigorously pursued her rape and abuse allegations. *See id.* And while Dr. Luke has repeatedly offered to dismiss the lawsuit if Kesha

admits that the rape did not occur,¹⁷⁶ Kesha has steadfastly refused, notwithstanding the crushing multi-million-dollar costs and stress of this litigation.

2. *The Alleged Publications Were Pertinent To The Litigation.*

“Pertinenc[e] is a question of law for the court to decide,” *Mosesson v. Jacob D. Fuchsberg Law Firm*, 683 N.Y.S2d 88, 89 (1st Dep’t 1999), applying an “extremely liberal” standard. *Flomenhaft v. Finkelstein*, 127 A.D.3d 634, 637 (1st Dep’t 2015). The privilege is lost “only when the language used goes beyond the bounds of reason and is so clearly impertinent and needlessly defamatory.” *Feist*, 2017 WL 177652, at *4.

The complaints provided to Sony’s General Counsel and TMZ were plainly pertinent to the California litigation, because they “substantively track[ed] the version that was filed.” *Feist*, 2017 WL 177652, at *5; *see also Liberty v. Coursey*, 2016 WL 5944468, at *15-16 (N.Y. Sup. Ct. Oct. 7, 2016) (rejecting impertinence argument where draft-complaint statements related to proposed claims); *Godesky Aff Ex. 211*. And the complaint that TMZ received was provided under an embargo “for the express purpose of permitting the reporter to write the story and have it ready for publication as soon as the Complaint was filed.” *Feist*, 2017 WL 177652, at *6; *see also Tacopina*, 645 F. App’x at 8 (extending privilege to distribution to press of draft pleading).

B. New York’s Absolute Judicial-Proceeding-Related Privileges Protect Kesha.

Under New York common law, “statements made during the course of a judicial or quasi-judicial proceeding are clearly protected by an absolute privilege as long as such statements are material and pertinent to the questions involved.” *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 365 (2007). New York Civil Rights Law § 74 similarly protects any “fair and true report of any judicial proceeding.” “Comments that essentially summarize or restate the allegations of a pleading filed in an action ... fall within [§ 74’s] privilege.” *Lacher v. Engel*, 33 A.D.3d 10, 17

¹⁷⁶ *Godesky Aff.*, Ex. 68.

(1st Dep’t 2006). Section 74’s privilege also “extends to the release of background material with regard to the case.” *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 478 (S.D.N.Y. 2012).

New York’s absolute, common-law judicial-proceedings privilege protects 6 of Kesha’s allegedly defamatory statements, because they were material and pertinent to the underlying litigations in which they were made. *See* Appx. D. Indeed, Kesha’s California and New York pleadings, and the affidavit that she submitted in support of her New York preliminary-injunction motion, detail the rape-and-abuse allegations on which her claims and motion were based.¹⁷⁷ Similarly, 19 of Kesha’s allegedly defamatory public statements are protected under Civil Rights Law § 74, because they reflect Kesha’s or her attorneys’ fair and true report of case background and litigation developments. *See* Appx. D. For example, Mr. Geragos made 7 statements in the immediate aftermath of the 2014 California and New York filings, explaining that Kesha’s claims were based on her “years as a victim of mental manipulation, emotional abuse, and sexual assault at the hands of Dr. Luke.” Appx. D.

Dr. Luke cannot overcome these absolute protections with conclusory “sham litigation” allegations. The facts underlying Kesha’s California and New York tort claims are long documented in Kesha’s contemporaneous reports (confirmed under oath), and hotel, phone, and medical records, and supported by uncontroverted empirical data. *See supra* 3, 11. Dr. Luke’s pre-litigation recognition of the claims’ veracity is reflected in his good-faith settlement negotiations, including by drafting a long-form settlement agreement. *See id.* 13. Dr. Luke’s recent admission that none of the abuse allegations in Kesha’s filings and public statements are defamatory (*infra* 39) further refutes his attorney-manufactured “sham litigation” argument.

Moreover, to the extent that Dr. Luke’s “sham litigation” refrain rests on Kesha’s voluntary-dismissal decision, the First Department has flatly rejected “sham litigation”

¹⁷⁷ *See supra* 14, 16.

arguments premised on substantive litigation losses. To hold otherwise “would substantially contravene the policy that underlies the privilege”: “If the privilege existed only in cases that were ultimately sustained, none of the persons whose candor is protected by the rule ... would feel free to express themselves.” *Lacher*, 33 A.D.3d at 14. That danger is of particular concern in cases where—as here—a woman dares come forward to assert sexual-assault allegations against a man in a position of substantial power. With regard to the California litigation, Kesha did everything she could to pursue her claims before a court that ultimately rejected her forum-selection arguments. *See supra* 14-17. Kesha’s New York claims were dismissed over her vigorous objection. *See id.* 16. Since then, Kesha has incurred substantial fees and costs forcefully defending the truth of her statements. *See supra* 17-18.

III. THE COURT SHOULD ENTER JUDGMENT IN KESHA’S FAVOR ON THE 18 STATEMENTS THAT ARE NON-ACTIONABLE EXPRESSIONS OF OPINION.

Defamation liability cannot be based on expressions of opinion. *See Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). Whether a particular statement constitutes an opinion is a question of law. *See id.* The Court of Appeals has recognized that a statement’s context “is often the key consideration in categorizing a statement as fact or opinion.” *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 585 (2012). “[E]ven apparent statements of fact” may “assume the character of statements of opinion, and thus be privileged, when made in public debate ... or other circumstances in which an audience may anticipate the use of epithets, fiery rhetoric or hyperbole.” *Sandals Resorts Int’l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 41-42 (1st Dep’t 2011). Accordingly, “sifting through a communication for the purpose of isolating and identifying assertions of fact should not be the central inquiry”; “[r]ather, it is necessary to consider the writing as a whole, as well as the over-all context of the publication.” *Id.* at 42; *accord Mann*, 10 N.Y.3d at 276-77.

It is well-settled in New York that the average listener will understand a statement made by an interested party or her counsel in the context of a lawsuit to reflect the speaker’s opinion,

rather than a factual assertion. *See, e.g., Sabharwal & Finkel, LLC v. Sorrell*, 117 A.D.3d 437, 437 (1st Dep’t 2014) (no defamation because defendant’s interview statements “constitute hyperbole and convey non-actionable opinions about the merits of the lawsuit”); *Sprecher v. Thibodeau*, 148 A.D.3d 654, 655 (3d Dep’t 2017) (“[C]omments made to the media by a party’s attorney regarding an ongoing lawsuit constitute nonactionable opinions.”). That is especially true where the nature of the lawsuit is “by its nature contentious and an average reader would recognize that statements made by the alleged wrongdoer...are likely to be the produce of passionate advocacy.” *Gentile v. Grand Street Med. Assoc.*, 79 A.D.3d 1351, 1353 (3d Dep’t 2010) (affirming summary-judgment dismissal regarding sexual-harassment-lawsuit statements).

Here, 18 of the allegedly defamatory statements were made by Kesha or her attorneys in the context of very contentious, high-profile litigation arising out of Kesha’s report that Dr. Luke raped and drugged her. *See* Appx. E. Those statements—7 of which were made in press releases from Kesha’s counsel—were clearly identified as statements regarding an ongoing lawsuit, and featured in articles or television programs *discussing the litigation*. *See id.* Any listener or reader would therefore understand that these statements reflected Kesha’s *allegations*, which Dr. Luke vigorously denied. In fact, many of the allegedly defamatory statements responded directly to public attacks by *Dr. Luke’s* legal team. For example:

- Dr. Luke seeks to hold Kesha liable for an October 16, 2014 statement by Mr. Geragos that allegedly “repeated Kesha’s false claim of sexual assault,” and was published by CNN, People, and TMZ. TAC ¶ 69. But each article (i) indicated that Dr. Luke denied Kesha’s allegations; (ii) identified Kesha’s attorney as the speaker; and (iii) described the statement as a response to Dr. Luke’s claim that Kesha was attempting to extort him.¹⁷⁸
- Likewise, the June 15, 2018 statement by Kesha’s counsel, *see* TAC ¶ 97, was a direct response to a statement released *two days before* by Dr. Luke’s team.¹⁷⁹ And the

¹⁷⁸ *See* Godesky Aff., Ex. 124 (“Geragos responded to [Dr. Luke’s attorney’s] extortion charge in his own statement to CNN”); *id.*, Ex. 126 (“Dr. Luke says the sexual assault lawsuit is part of an extortion plan ... But Kesha’s side is not backing down.”); *id.*, Ex. 84 (describing Dr. Luke’s denials and claims of extortion and noting “Kesha’s lawyer, Mark Geragos, tells TMZ ...”).

¹⁷⁹ *See, e.g., id.*, Ex. 197.

publications noted that “[Dr.] Luke has strenuously denied all charges of sexual assault.”¹⁸⁰ Given the statements’ overall “context” and “tone,” *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995), no reader would understand them to be anything but “the product of passionate advocacy” in the context of a “contentious” lawsuit. *Gentile*, 79 A.D.3d at 1353.¹⁸¹

Courts are also “required to take into consideration ... the nature of the particular forum.” *Brian*, 87 N.Y.2d at 51. New York courts recognize that news programs, cable talk shows, and radio broadcasts are the very atmosphere “in which an audience may anticipate the use of epithets, fiery rhetoric or hyperbole,” and where “apparent statements of fact may assume the character of statements of opinion.” *Sandals*, 86 A.D.3d at 41-42; *Huggins v. Nat’l Broad. Co.*, 1996 WL 763337, at *3 (N.Y. Sup. Ct. Feb. 7, 1996) (“unscripted, unrehearsed live interview” where “loose structure and conversational tone signaled to the viewers that they were hearing [the speaker’s] own beliefs and perspective” nonactionable); *Hobbs v. Imus*, 266 A.D.2d 36, 37 (1st Dep’t 1999) (radio-talk show statements nonactionable because they “would not have been taken by reasonable listeners as factual pronouncements”); *Jacobus v. Trump*, 51 N.Y.S.3d 330, 340 (N.Y. Sup. Ct. 2017), *aff’d*, 156 A.D.3d 452 (1st Dep’t 2017) (“comments made on television talk shows ... are deemed nonactionable opinion”).

Mr. Geragos made 8 of the statements on unscripted entertainment-news programs, cable talk shows, and podcasts in which the parties claims were discussed and debated. *See* Appx. E.¹⁸² The Court should find these “spirited verbal exchanges” nonactionable. *Jacobus*, 51

¹⁸⁰ *See, e.g., id.*, Ex. 198; *id.*, Ex. 200.

¹⁸¹ Mr. Geragos, who is well known for his “fiery rhetoric” and zealous advocacy, *Sandals*, 86 A.D.3d at 42, made 14 of the statements. *See* Godesky Aff., Ex. 199 (“Pit bull. Hollywood. Showboat. All of these have been used to describe Mark Geragos”); *id.*, Ex. 195 (“Mark Geragos is known as a flamboyant, showboating celebrity in his own right”). His reputation further alerted any listener that his statements express opinions, not facts. *See, e.g., TAC*, ¶ 69 (“predator”); ¶ 75 (“pathetic vermin”).

¹⁸² The allegedly defamatory statements made on social media by are likewise nonactionable. *See* Appx. E. Because “[t]he culture of Internet communications ... has been characterized as

N.Y.S.3d at 340; *see also Gisel v. Clear Channel Commc'ns, Inc.*, 94 A.D.3d 1525, 1526-27 (4th Dep't 2012) (affirming summary judgment because "reasonable listener would not have thought that [the defendant] was stating facts" in calling plaintiff "cold-blooded murderer" when radio talk show "generally provided a forum for public debate on newsworthy topics").

IV. DR. LUKE'S AGENCY-BASED THEORY OF LIABILITY IS MERITLESS.

Under New York law, a defendant can be liable for a third party's statements only if she authorized or directed the allegedly defamatory statements. *See Art. Fin. Partners, LLC v. Christie's, Inc.*, 58 A.D.3d 469, 471 (1st Dep't 2009) (principal-agent relationship only if "consent of one person to allow another to act on his or her behalf and subject to his or her control"); *Geraci v. Probst*, 15 N.Y.3d 336, 342 (2010) (no liability if republication occurred "without [] authority or request, by others over whom [defendant] has no control"); *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 59 (2d Cir. 2002) (no republication liability unless "the original author was responsible for or ratified the republication").

Kesha cannot be held liable for Pebe's and Mr. Eisele's statements. The undisputed record is that Kesha neither authorized nor directed 14 statements made by Pebe (7) and Mr. Eisele (7) identified in Appendices B and C. *See supra* 16-17. In fact, it is undisputed that Kesha did not even know about the statements before they were made. *See id.* Those 14 allegedly defamatory statements must be dismissed from the case on that basis. *See Goldstein v.*

encouraging a freewheeling, anything-goes writing style," *Sandals*, 86 A.D.3d at 43, "New York courts have consistently protected statements made in online forums"—particularly "epithets, fiery rhetoric or hyperbole"—as "vigorous expressions of personal opinion, rather than the rigorous and comprehensive presentation of factual matter." *Jacobus*, 51 N.Y.S.3d at 338-39. That is especially true where the author, "at the outset," signals "that he [i]s not a disinterested observer." *Brian*, 87 N.Y.2d at 53-54. Here, 3 of the allegedly defamatory statements appeared on personal Facebook, Instagram, and Twitter pages, where the "broader social context" involved a contentious litigation and public controversy on the highly emotional issue of a rape allegation. *Id.* Moreover, the speakers' audiences were well aware that each speaker had either a personal or professional interest in Kesha's litigation.

Lipetz, 150 A.D.3d 570 (1st Dep’t 2017) (no triable issue regarding agent’s actual authority); *Ciaravino v. Bulldog Nat. Logistics, LLC*, 146 A.D.3d 928, 929-30 (2d Dep’t 2017) (reversing failure to grant summary judgment where no evidence of control over purported agents).

V. THE COURT SHOULD ENTER JUDGMENT THAT KESHA IS NOT LIABLE FOR STATEMENTS REGARDING DR. LUKE’S ABUSE.

On October 15, 2018, Plaintiffs’ counsel stated that Dr. Luke no longer claims that Kesha’s statements about Dr. Luke’s verbal and emotional abuse are defamatory.¹⁸³ Those 16 statements (*see* Appx. F) must be dismissed from the case on that basis. *See Tai Wing Hong Importers, Inc. v. King Realty Corp.*, 208 A.D.2d 710, 711 (2d Dep’t 1994) (“Admissions by counsel are admissible against a party, provided that the statements were made by the attorney while acting in his capacity.”).

VI. THE COURT SHOULD ENTER JUDGMENT IN KESHA’S FAVOR ON THE 35 TIME-BARRED STATEMENTS.

The statute of limitations for defamation runs one year from “the date of publication” of the allegedly defamatory statement. *Casa de Meadows Inc. (Cayman I.) v. Zaman*, 76 A.D.3d 917, 920 (1st Dep’t 2010); CPLR 215(3). Yet, Dr. Luke seeks to hold Kesha liable for 35 statements made between October 10, 2014 and April 3, 2016, *see* Appx. A, that Dr. Luke identified for the first time on May 4, 2018.¹⁸⁴ Those statements—which appear nowhere in Dr. Luke’s earlier pleadings, *see supra* 18—are time-barred as a matter of law.

Dr. Luke’s only argument to the contrary is that the 35 statements relate back to the timely pled allegations in his earlier pleadings. *See* CPLR 203(f). Not so. As Kesha has previously explained at length,¹⁸⁵ all allegedly defamatory statements must be pleaded with particularity under black-letter New York law. *See Gardner v. Alexander Rent-A-Car, Inc.*, 28

¹⁸³ Godesky Aff. ¶ 3 and Ex. 1; *see also supra* 10 (Ms. Cornia’s contemporaneous reports).

¹⁸⁴ *See* Godesky Aff., Ex. 170 at 5.

¹⁸⁵ *See id.*, Ex. 141 at 17.

A.D.2d 667, 667 (1st Dep’t 1967) (complaint “required to state in *haec verba* the particular defamatory words”); *Dillon v. City of N.Y.*, 261 A.D.2d 34, 40 (1st Dep’t 1999) (complaint must identify “time, place, and manner of the communication”). The same stringent standards govern whether a new statement can relate back to a prior pleading; failure to timely identify the particular defamatory words, speaker, medium, date, or audience deprives the defendant of the required “notice of the transactions [or] occurrences...to be proved.” CPLR 203(f).

It is undisputed that the 35 time-barred statements do not appear in Dr. Luke’s prior pleadings.¹⁸⁶ Despite Dr. Luke’s notice of these public statements, they were: (i) quoted nowhere in the earlier pleadings; (ii) made by Mr. Geragos, Mr. Eisele, and individuals at Sunshine Sachs, none whom were previously identified; (iii) made on numerous media outlets that were not previously alleged; (iv) made on 27 dates not previously identified; and (v) made to entirely new audiences, including Kesha’s Instagram followers and the Court. And Dr. Luke’s earlier pleadings *affirmatively represented* that he would *not* be seeking to hold Kesha liable for post-October 14, 2014 statements. *See supra* 18. Kesha cannot be on notice of claims that were required to be specifically pleaded, and were deliberately omitted for strategic-litigation reasons relating to litigation privilege. Relation back is therefore improper.¹⁸⁷

CONCLUSION

For the above reasons, the Court should enter partial summary judgment for Kesha.

¹⁸⁶ Compare *id.*, Exs. 145 and 152.

¹⁸⁷ Applying the liberal pleading rule that leave to amend should be granted freely unless the proposed amendment is “palpably devoid of merit,” *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep’t 2012), the Court previously declined to hold that the belatedly identified statements were time barred. *See Godesky Aff.*, Ex. 151. Dr. Luke is now subject to a much higher standard; to avoid summary judgment, Dr. Luke must adduce evidence raising a triable issue of fact as to whether these statements relate back. *See LeBlanc v. Skinner*, 103 A.D.3d 202, 208 (2nd Dep’t 2012); *Jolly v. Russell*, 203 A.D.2d 527, 528 (2nd Dep’t 1994). He has not carried that burden.

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Rule 17 Word Count Certification

Word Count: I certify that no word-count certification is required under 22 NYCRR § 202.70(g) Rule 17, because the Court gave Kesha a 40-page limit for her summary-judgment brief during an October 16, 2018 telephone conference with Law Clerk Michael Rand, Esq. This brief is compliant because it is 40 pages.

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